Supreme Court, U.S.
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No. 99-1563

IN THE

Supreme Court of the United States

S&M ENTERPRISES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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Petitioner, S&M Enterprises ("S&M"), submits this reply brief to correct two serious misstatements of the record by the Government in its brief in opposition. Contrary to the Government's contentions, petitioner preserved its claims under the just compensation clause of the Fifth Amendment for reimbursement of the New York State real property transfer gains tax it has paid. S&M also replies to several arguments in the Government's brief in further support of petitioner's position that the transfer gains tax is a transfer tax or similar expense within the meaning of the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("Policies Act"), 42 U.S.C. § 4653(1).

REASONS FOR GRANTING THE WRIT

I.

PETITIONER PRESERVED ITS FIFTH AMENDMENT CLAIM. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER THE GOVERNMENT IS REQUIRED TO REIMBURSE S&M FOR THESE TAXES UNDER THE FIFTH AMENDMENT.

The Government contends that: (i) petitioner did not preserve its Fifth Amendment claim before the Court of Federal Claims; and (ii) the final award entered as a consent judgment in the district court condemnation proceeding precluded petitioner from pursuing a Fifth Amendment claim in the Court of Federal Claims. (Government's Brief In Opposition, pp. 6-7). Both contentions are without merit.

The Government is incorrect in alleging that S&M did not raise or discuss its Fifth Amendment claim in the Court of Federal Claims. The claim was asserted in S&M's first

amended complaint (Joint Appendix in the United Court of Appeals for the Federal Circuit ("JA") 142-143, ¶¶ 17-18) as well as in its second amended complaint (JA 161, ¶¶ 21-22). In its Reply Memorandum of Law in Further Support of its Cross-Motion for Summary Judgment, dated March 9, 1989, S&M stated:

> Defendant overlooks that the Government has the obligation under the Fifth Amendment of the Constitution to pay "just compensation" to the condemnee. To the extent the Tax is deducted from the condemnation award, Plaintiff is deprived of the full value of its property and hence fair treatment. Contrary to Defendant's assertion, the granting of Plaintiff's claim would not constitute a windfall. Rather, it would mean that the condemnation award would not be diminished by the amount of the Tax. Plaintiff would still remain liable for payment of federal and state income taxes on the gain derived from the condemnation.

(pp. 5-6).

The Court of Federal Claims rejected S&M's Fifth Amendment claim (34a)[1]. Although petitioner argued in support of its Fifth Amendment claim in its brief (pp. 38-40) and reply brief (pp. 23-25) to the Federal Circuit, that court failed to address the issue in its opinion (1a).

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1. References to the Appendix annexed to S&M's Petition For A Writ Of Certiorari are designated parenthetically as "___a".

The Government's second contention is that "[i]n the district court proceedings that preceded the filing of this case, petitioner stipulated to an amount of just compensation for the taking of its property that did not include the amount that petitioner now seeks." (Government's Brief, p. 7). The Government further contends that "the Court of Federal Claims lacks jurisdiction . . . to increase a just-compensation award, when the property was taken pursuant to a final award entered in a district court condemnation proceeding." *Id.*

The Consent Judgment, however, contained an express reservation of rights to permit the petitioner to pursue its claims in the Court of Federal Claims. The parties agreed: "This judgment of compensation is without prejudice to the condemnee's pursuit of the claims asserted in its action now pending in the Court of Federal Claims for reimbursement of the New York State Transfer gains tax".[2] The reference to "claims" in the plural was deliberate. It was intended to include all petitioner's claims, including its Fifth Amendment claim and its claim that the transfer gains tax is a "transfer tax" or a "similar expense" within the meaning of the Policies Act. Surprisingly, the Government does not refer to the applicable provision of the Consent Judgment quoted above. In sum, petitioner preserved its Fifth Amendment claim.

Should the Court not grant relief under the Policies Act and reach the constitutional issue, petitioner's Fifth Amendment claim presents a significant issue as to the elements of value to be included in determining just compensation. The Government sets forth the general proposition that compensation under the Fifth Amendment

2. A copy of the Consent Judgment is annexed as an exhibit to this reply brief; we have italicized the quoted passage which appears at page 3 of the Consent Judgment.

is payable only for the property taken and not for incidental or consequential losses. An incidental loss, the Government maintains, is "the state capital gains taxes that any transferor of the property must pay" (Government's Brief, p. 8). The Government overlooks that in addition to the transfer gains tax, which is the subject of this case, New York State has a capital gains tax. Petitioner acknowledges its liability to pay both the federal and state capital gains taxes although both jurisdictions have provided for deferral of payment (S&M's Petition for A Writ Of Certiorari, p. 19). Because the transfer gains tax is not a capital gains tax, it is not afforded this treatment.

The Government has also not responded to the fact that in a voluntary transaction, the seller has the right to negotiate and have the buyer pay the transfer gains tax as part of the arm's-length bargaining to determine the purchase price. Ordinarily the price agreed to between a willing buyer and a willing seller is the best evidence of fair market value. In condemnation, a forced sale, the condemnee is deprived of this right. The loss of this right to negotiate and to have the buyer pay the transfer gains tax, we submit, is an element of value for which the condemnee is entitled to compensation. See *United States v. 1,291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969). The case at bar raises an important issue as to which costs incident to a condemnation are compensable under the Fifth Amendment.

II.

THE NEW YORK STATE TRANSFER GAINS TAX IS A TRANSFER TAX OR A SIMILAR EXPENSE WITHIN THE MEANING OF THE POLICIES ACT.

We respond to several arguments advanced by the Government which were not addressed in the Petition for Certiorari.

1. The Government contends that since no deed is involved in a federal condemnation under the Declaration of Taking Act, 40 U.S.C. § 258a, and a recording is not necessary to perfect the Government's right of title to the real property, the transfer gains tax does not satisfy the statutory requirement of "transfer taxes, and similar expenses incidental to conveying such real property to the United States," 42 U.S.C. § 4653(1) (Government's Brief, p. 6, n.2). The argument is unconvincing. The Government's argument addresses the power of the federal government, not the nature of the transfer gains tax. The federal government unquestionably possesses the power to acquire title to real property under 40 U.S.C. § 258a without following state law requirements governing property title transfer and the recording of deeds. The exercise of that power, however, does not alter the essential nature or character of any transfer taxes that apply to transfers of title under state law.

If the Government's argument were correct, no transfer tax would be reimbursable under the Policies Act, a result that would be squarely at odds with the statute. A federal condemnee is exempt from payment of the traditional New York State transfer tax. N.Y. Tax Law § 1405. But assume the condemnee were not exempt. The Government could not

seriously contend that a condemnee should not be reimbursed for payment of that transfer tax because the Government acquired title under the Declaration of Taking Act and did not record the transfer. The Government's argument would negate the purpose of the Policies Act of providing protection to the condemnee. Quite simply, the Government's decision to proceed under the Declaration of Taking Act or in some other manner does not alter the nature of the transfer gains tax.

2. The Government argues that the requirement that the transfer gains tax be paid before the deed would be recorded (S&M's Petition, pp. 14-15) "served merely as a mechanism to ensure collection; it did not convert the Article 31-B tax on capital 'gains' into a 'transfer tax' " (Government's Brief, p. 5). Here, too, the Government's argument is not persuasive. Both a traditional transfer tax and the transfer gains tax have the same essential characteristic — the tax is required to be paid at the time of transfer as a prerequisite for the recording of the deed. This characteristic is both an essential element of both taxes as well as a mechanism for their enforcement. The taxes are determined on the basis of a single transfer. By contrast, a capital gains tax is computed on the aggregate of the taxpayer's various gains and losses during the taxable period and is payable following the close of the taxpayer's tax year when the tax return is due. Only the transferor is liable for the gains tax whereas both the transferor and under some circumstances the transferee are liable for payment of the transfer gains tax.

In sum, the transfer gains tax and the traditional transfer tax have the same predominant characteristics in distinction to the capital gains tax. Thus, the transfer gains tax is a transfer tax or an expense similar to a transfer tax within the

meaning of the Policies Act. Through the use of the plural — "transfer taxes" and "similar expenses" — the Policies Act contemplates that a jurisdiction may have more than one transfer tax. Here, New York State has two transfer taxes, one computed on the amount of the transfer and the other computed on the amount of the gain.

3. The Government contends that the transferor was required only to pay a "tentative assessment" at the time of transfer (Government's Brief, p. 6). This argument overlooks that the New York State Department of Taxation and Finance established an elaborate pre-transfer audit procedure in accord with § 1447 of the N.Y. Tax Law (S&M's Petition, pp. 13-14). The amount determined after the pre-transfer audit was required to be paid before recordation of the deed. The significant fact is that the tax, whether it be a tentative assessment or the full amount, was required to be paid at the time of transfer of the particular property.

Furthermore, the amount of the tax was determined as of the date of transfer. Thus, interest on the amount of the tax not paid by the date of transfer ran from the date of transfer. Also, the assessment was not tentative in that subsequent events would determine the amount of the tax. The amount of the tax was calculated based upon the consideration paid or owing on the date of transfer of title. Even if a subsequent event were to diminish the value of the property, such as a buyer's failure to pay a purchase money mortgage, it would not affect the amount of the tax or entitle the transferor to a refund.[3]

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3. *In re 31/32 Lexington Assoc. v. Tax Appeals Tribunal*, 258 A.D.2d 684, 685 N.Y.S.2d 329 (3d Dept.), *appeal dismissed*, 93 N.Y.2d 919, 713 N.E.2d 418, 691 N.Y.2d 383 (1999); (Cont'd)

4. The Government does not deny that federal agencies on a fairly regular basis deal with administrative claims seeking compensation under the transfer tax and similar expense provisions of the Policies Act. Nor does the government respond to the point that at least 24 states have adopted legislation modeled on the Policies Act and provide for the condemnor to reimburse the condemnee for transfer taxes and similar expenses incidental to the condemnation. (50a). Both the construction of the Policies Act and, if necessary, the Fifth Amendment claim merit determination by this Court to assure that condemnees receive fair and equitable treatment from the Government.

(Cont'd)

In re Brockman v. Tax Appeals Tribunal, 238 A.D.2d 693, 694, 656 N.Y.S.2d 429, 430-31 (3d Dept. 1997); *In re South Suffolk Recreation Ventures v. Tax Appeals Tribunal*, 224 A.D.2d 874, 875, 638 N.Y.S.2d 515, 516 (3d Dept.), *leave to appeal denied*, 88 N.Y.2d 803, 668 N.E.2d 417, 645 N.Y.S.2d 446 (1996); *In re Wanat v. Tax Appeals Tribunal*, 224 A.D.2d 873, 874, 638 N.Y.S.2d 251, 252 (3d Dept.), *leave to appeal denied*, 88 N.Y.2d 803, 668 N.E.2d 417, 645 N.Y.S.2d 446 (1996).

CONCLUSION

For all the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit to review the important federal questions here presented and, following such review, reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX — CONSENT JUDGMENT DATED JULY 26, 1993 AND FILED JULY 29, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

87 Civ. 4635 (MBM)

#93,1790

UNITED STATES OF AMERICA,

Plaintiff,

-against-

17,380 SQUARE FEET OF LAND SITUATED IN THE COUNTY OF NEW YORK, STATE OF NEW YORK; S & M ENTERPRISES; MANUFACTURER'S HANOVER TRUST CO.; VAN WAGNER ADVERTISING CORP.; THE CITY OF NEW YORK; AND UNKNOWN OTHERS,

Defendants.

CONSENT JUDGMENT

WHEREAS, the attorneys for the United States of America (the "Government") and defendant S & M Enterprises have orally stipulated to, and the Court has adopted, the following findings of fact and conclusions of law:

1. The Government filed a complaint in condemnation on June 29, 1987, at the request of the United States Postal Service, pursuant to 40 U.S.C. §§ 257 and 258(a).

2. The Government thereby acquired by eminent domain the property located at Block 918, Lot 6 and known as 207-213 East 36th Street and 204-208 East 37th Street, New York, New York (the "property"). A legal description of the property is annexed hereto as Exhibit A. The property consists of 17,380 square feet of land improved with a five-story commercial warehouse building of 103,424 square feet with entrances on both 36th and 37th Streets, 100 feet east of Third Avenue.

3. Immediately prior to the condemnation, the property was owned by the defendant S & M Enterprises (the "condemnee").

4. On June 29, 1987, simultaneously with the filing of the complaint in condemnation, the Government deposited the sum of $15,300,000.00 in the Registry of the Court as estimated just compensation for the property. Pursuant to a Court order dated August 25, 1987, the Court paid out $13,300,000.00 of that amount to the condemnee. The remaining $2,000,000.00, with interest, was paid to the condemnee pursuant to order of the Court, dated February 26, 1988. *United States v. 17,380 Square Feet of Land*, 678 F. Supp. 443 (S.D.N.Y. 1988).

5. This proceeding has been regularly conducted and all necessary parties to this action have been served.

6. The trial in this case took place on April 19-22, 1993.

7. The Government and the condemnee have stipulated and agreed to the amount of just compensation for the subject property.

8. The Government has the right to condemn the property for public use.

NOW, therefore, upon the agreement of the parties,

IT IS ORDERED, ADJUDGED AND DECREED that the just compensation payable by the United States for the taking of the fee simple absolute title to the property is the sum of TWENTY-TWO MILLION THREE HUNDRED SEVENTY-THREE THOUSAND FIFTY-ONE DOLLARS ($22,373,051.00), inclusive of interest, and judgment is hereby entered against the United States of America in the aforesaid amount. This judgment of compensation includes and finally resolves all claims raised by the condemnee in this action, including, without limitation, the condemnee's claim for compensation for the right to maintain an advertising sign on the eastern wall of the building on the property. *This judgment of compensation is without prejudice to the condemnee's pursuit of the claims asserted in its action now pending in the Court of Federal Claims for reimbursement of the New York State transfer gains tax.*

The United States has partially satisfied this judgment by and to the extent of its previous payment of $15,300,000.00, which the condemnee has already received. The fee simple absolute title to the above-described tract of land shall vest in the United States free and discharged of all claims and liens of every kind whatsoever upon payment of the sum of SEVEN MILLION SEVENTY-THREE THOUSAND FIFTY-ONE DOLLARS ($7,073,051.00) to the condemnee.

IT IS ALSO ORDERED AND ADJUDGED that the said estates and interests are hereby condemned and taken for the use of the United States of America as authorized by law.

IT IS FURTHER ORDERED that the oral stipulation of the parties is in all things ratified, confirmed and adopted as the judgment of compensation in this case.

The United States of America will pay the sum of SEVEN MILLION SEVENTY-THREE THOUSAND FIFTY-ONE DOLLARS ($7,073,051.00) to the condemnee by check payable to S & M Enterprises or by electronic wire transfer to a bank account designated in writing to the attorneys for the United States by the attorneys for S & M Enterprises. If payment is not made on or before July 30, 1993, interest will continue to run on the amount in accordance with 40 U.S.C. § 258e-1 from July 31, 1993 until payment. The applicable rate of interest from June 29, 1993 through June 28, 1994 shall be 3.54 percent per annum calculated on the principal amount of $7,051,163.00, or $683.87 per day.

The Clerk of the Court shall close the file in this case upon entry of this judgment.

The Court retains jurisdiction to make and enter such further orders and judgments as may be necessary and proper.

The entry of the above order is consented to by the undersigned.

Dated: New York, New York
July 26, 1993

Appendix

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